

RESOLUTION NO. 4 4 7 1

A RESOLUTION OF THE CITY COUNCIL OF THE
CITY OF AUBURN, WASHINGTON, AUTHORIZING
THE MAYOR TO EXECUTE A SETTLEMENT
AGREEMENT WITH JACOBS ENGINEERING
GROUP, INC., AND W&H PACIFIC, INC.,
REGARDING THE SOUTH 277TH STREET ROAD
RECONSTRUCTION PROJECT

WHEREAS, the City of Auburn entered into a contract with Sverdrup Civil Engineers in August of 1996 to prepare design drawings for the Road Reconstruction Project on South 277th Street; and

WHEREAS, Sverdrup Civil Engineers, in turn, hired W&H Pacific, Inc, as a sub-consultant to determine right-of-way requirements, including the location of the new road's right-of-way and identification of any property that would need to be acquired by the City; and

WHEREAS, based on the survey and real property information provided by W&H Pacific, Inc., the City acquired property needed for the project, but that did not include property owned by David Monk, as the W&H Pacific, Inc., survey and real property information indicated that the property along David Monk's property was already public right-of-way; and

WHEREAS, in 2002, David Monk filed a lawsuit against the City asserting, among other things, that the City had built a portion of the South 277th Street Project on his property without his permission; and

WHEREAS, in connection with the Monk lawsuit, the King County Superior Court concluded that some of the needed property did belong to David Monk; and

WHEREAS, in that same lawsuit, the Court awarded Mr. Monk Sixty-Four Thousand, Two Hundred Fifty-Nine and 79/100 Dollars (\$64,259.79) in damages, along with Two Hundred Fifty-Three Thousand Seven Hundred Sixty-Eight and 50/100 Dollars (\$253,768.50) in attorneys' fees, expert witness fess, and costs; and

WHEREAS, Jacobs Engineering Group is the successor in interest to Sverdrup Civil Engineers, and

WHEREAS, the City filed an indemnity action against Jacobs Engineering Group alleging that Sverdrup Civil Engineers and W&H Pacific failed to properly identify the right-of-way on the South 277th Street Project with regard to Mr. Monk's property, resulting in the City having to pay the attorneys' fees, expert witness fess, and costs, and

WHEREAS, Jacobs Engineering Group, successor to Sverdrup Civil Engineers, and W&H Pacific, Inc., desire to settle the lawsuit; and

WHEREAS, the City Council finds that the terms of settlement in the attached settlement agreement are acceptable,

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF AUBURN, WASHINGTON, HEREBY RESOLVES as follows:

Section 1. That the Mayor is authorized to enter into a Settlement Agreement with Jacobs Engineering Group, Inc., and W&H Pacific, Inc., which agreement shall be in substantial conformity with the Agreement a copy of which is attached hereto, marked as Exhibit "A" and incorporated herein by this reference.

Section 2. That the Mayor is authorized to implement such administrative procedures as may be necessary to carry out the directives of this legislation.

Section 3. That this Resolution shall take effect and be in full force upon passage and signatures hereon.

Dated and Signed this _____ day of _____, 2009.


CITY OF AUBURN

PETER B. LEWIS
MAYOR

ATTEST:

Danielle E. Daskam, City Clerk

APPROVED AS TO FORM:



Daniel B. Heid, City Attorney

SETTLEMENT AGREEMENT

This Settlement Agreement (“Agreement”) is entered into as of the ____ day of April, 2009 by and between the CITY OF AUBURN (“City”), JACOBS ENGINEERING GROUP, INC. (“Jacobs”), and W&H Pacific, Inc. (“W&H Pacific”). The City, Jacobs, and W&H Pacific are sometimes hereinafter referred to as “Party(ies).”

RECITALS

A. The City contracted with Sverdrup Civil Engineers, Jacobs’ predecessor in interest, for professional design services (the “Contract”) in connection with the Road Reconstruction Project on South 277th Street between Auburn and Kent (“Road Project”).

B. Jacobs, in turn, entered into a contract with W&H Pacific as a subconsultant to determine right-of-way requirements with regard to the Road Project.

C. In 2002, Mr. Monk filed a lawsuit against the City (King County Cause No. 02-2-13216-2 KNT) asserting, among other things, an inverse condemnation claim related to the Road Project and his property (the “Monk Lawsuit”). The Court ultimately found a taking of Mr. Monk’s property and awarded him \$64,259.79 in damages. The court also awarded Mr. Monk his attorneys’ fees, expert witness fess, and costs in relation to the inverse condemnation claim.

D. The City filed an indemnity action against Jacobs alleging that Jacobs and W&H Pacific failed to properly identify the right-of-way on the Road Project with regard to Mr. Monk’s property. The City sought recovery of all damages awarded to Mr. Monk in the prior litigation.. The lawsuit is captioned *Complaint for Breach of Contract*, King County Superior Court, Cause No. 08-2-20246-1 KNT (the “Lawsuit”). Jacobs answered, denying all claims, and filed a Third Party Complaint against W&H Pacific, alleging indemnity and breach of contract.

E. Jacobs and W&H Pacific deny they are liable for the claims asserted in the Lawsuit.

F. All Parties desire to settle the Lawsuit on the terms and conditions described in this Agreement.

Therefore, the Parties agree as follows:

TERMS

1. Payment Terms. Within thirty (30) days of mutual execution of this Agreement, the City shall receive one check payable to the City of Auburn from Jacobs Engineering Group, Inc. for Ten Thousand Dollars and 00/100 (\$10,000) and one check payable to the City of Auburn from W&H Pacific, Inc. for Two Hundred Forty-Three Thousand Seven Hundred Sixty-Eight Dollars and 50/100 (\$243,768.50) for a total payment of Two Hundred Fifty-Three Thousand Seven Hundred Sixty-Eight Dollars and 50/100 (\$253,768.50).

2. Waiver and Unconditional Release by the City. The City does hereby forever release, remise, acquit, and discharge Jacobs Engineering Group, Inc. and W&H Pacific, Inc., their affiliates, predecessors, shareholders, subsidiaries, affiliated entities, agents, employees, contractors, subcontractors, officers, directors, representatives, successors, assigns, engineers, attorneys, and all other persons or entities who are claimed to be or may be liable of and from any and all claims, demands, damages, liabilities, suits, actions, and causes of action of whatsoever kind, nature, or description, present and future, now known or hereafter discovered, whether arising in law or equity, upon contract or tort, or under state or federal law or laws, or under common law or otherwise, which the City has had, now has, or hereafter may have or claim to have, against Jacobs or W&H Pacific for or by reason of any act, omission, matter,

cause or thing whatsoever related to the Lawsuit, the Monk Lawsuit, or the Contract.

The City acknowledges that it has specifically contemplated and bargained for the extinguishment of all Claims arising from the Lawsuit, the Monk Lawsuit, or the Contract, as well as unknown claims, and is aware of the holding in Nevue v. Close, 123 Wn.2d 253, 867 P.2d 635 (1994). The City further agrees to defend and hold Jacobs and W&H Pacific harmless from any and all liens and subrogation interests arising out of either the Lawsuit, the Contract, the Monk Lawsuit, or this Settlement Agreement. The City's duty to defend and hold Jacobs and W&H Pacific harmless extends to any subrogation interest that has been or could be asserted by the City's liability carrier with relation to the Lawsuit, the Contract, the Monk Lawsuit, or this Settlement Agreement.

3. Waiver and Unconditional Release by Jacobs. Jacobs hereby releases W&H Pacific, its affiliates, predecessors, shareholders, subsidiaries, affiliated entities, agents, employees, contractors, subcontractors, officers, directors, representatives, successors, assigns, engineers, and attorneys in the same manner and to the extent of the City's release as expressly stated in Paragraph 2.

4. Waiver and Unconditional Release by W&H Pacific. W&H Pacific hereby releases Jacobs, its affiliates, predecessors, shareholders, subsidiaries, affiliated entities, agents, employees, contractors, subcontractors, officers, directors, representatives, successors, assigns, engineers, and attorneys in the same manner and to the extent of Jacobs' release as expressly stated in Paragraph 3.

5. No Admission of Liability. The Parties acknowledge that the releases set forth herein and Jacobs' and W&H Pacific's giving of consideration pursuant to the terms of this

Agreement do not constitute an admission of liability by Jacobs or W&H Pacific and are given in full settlement and compromise of the disputed claims alleged by the Parties in the Lawsuit.

6. Representation. The City of Auburn is represented herein by Daniel B. Heid and Stephen R. King of the City of Auburn Legal Department. Jacobs Engineering Group, Inc. is represented herein by Stanton P. Beck and Jennifer M. Beyerlein of Lane Powell PC. W&H Pacific, Inc. is represented herein by Henry Jameson of Jameson, Babbitt, Stites & Lombard, P.L.L.C. The Parties acknowledge that their respective attorneys have fully advised them concerning their rights with respect to the execution of this Agreement and its effects and that they understand the same; and that the named attorneys are authorized and directed to take all necessary action to dismiss with prejudice all claims and causes of action set forth in the Lawsuit without costs or attorneys' fees to any Party, each Party to bear that Party's own fees and costs.

7. Dismissal of Lawsuit. Within five business days after the City's receipt of the Settlement Amount, the Parties shall cause to be filed in the Lawsuit a dismissal with prejudice of all claims asserted therein.

8. Enforcement. This Agreement shall be construed and enforced in accordance with, and governed by, the laws of the State of Washington. Venue for any disputes relating to this Agreement shall be had in King County Superior Court, Seattle, Washington.

9. Jointly Drafted. This Agreement has been drafted jointly by the Parties following negotiations between them. It shall be construed according to its terms and not for or against any Party.

10. Entire Understanding. This Agreement contains the entire understanding of the Parties in connection with the subject matter of this Agreement and it supersedes and replaces all prior negotiations, statements, and representations concerning the subject matter of this

Agreement except as expressly contained in this Agreement.

11. Severability. If any provision of this Agreement is deemed by law to be void, invalid, or inoperative for any reason, or any phrase or clause within such provision is deemed by law to be void, invalid, or inoperative, that phrase, clause, or provision shall be deemed modified to the extent necessary to make it valid and operative, or if it cannot be so modified, then such phrase, clauses, and provisions shall be deemed severed from this Release, with the remaining phrases, clauses, and provisions continuing in full force and effect as if the Agreement had been signed with the void, invalid, or inoperative portion so modified or eliminated.

12. Authority. The Parties acknowledge and represent that they are effecting this settlement and executing this Agreement after having received full legal advice to their rights from legal counsel, and hereby warrant that they have the sole right and exclusive authority to perform their respective obligations under this Agreement and receive the benefits specified herein, and that no other person or entity has or has had any interest in the claims released herein, nor have any of the claims referred to herein been sold, assigned, transferred, conveyed or otherwise disposed of.

13. Descriptive Headings. Titles to paragraphs in this Agreement are for informational purposes only and are not intended to limit or amplify the content of any paragraph.

14. Execution. This Agreement may be executed in any number of counterparts, and each such counterpart hereof shall be deemed to be an original instrument, but all such counterparts shall constitute one agreement.

15. Amendment. This Agreement may not be amended, altered or modified, except by a written amendment executed by all Parties.

DATED this _____ day of _____, 2009.

The City of Auburn

By _____
 _____ *Name*
 _____ *Title*

[illegible]

I, the undersigned, a Notary Public in and for the State of Washington, hereby certify that on this _____ day of _____, 2008, personally appeared before me _____, to me known to be the individual described in and who executed the foregoing instrument and acknowledged that he/she signed the same as his/her free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand the day and year last above-written.

Notary Public
in and for the State of Washington.
Residing at _____
Commission Expires: _____

DATED this _____ day of _____, 2009.

W&H Pacific, Inc.

By _____

Name
Title

STATE OF ALASKA)
) ss.
COUNTY OF _____)

I, the undersigned, a Notary Public in and for the State of Washington, hereby certify that on this _____ day of _____, 2008, personally appeared before me _____, to me known to be the individual described in and who executed the foregoing instrument and acknowledged that he/she signed the same as his/her free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand the day and year last above-written.

Notary Public
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RECITALS

A. The City contracted with Sverdrup Civil Engineers, Jacobs’ predecessor in interest, for professional design services (the “Contract”) in connection with the Road Reconstruction Project on South 277th Street between Auburn and Kent (“Road Project”).

B. Jacobs, in turn, entered into a contract with W&H Pacific as a subconsultant to determine right-of-way requirements with regard to the Road Project.

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E. Jacobs and W&H Pacific deny they are liable for the claims asserted in the Lawsuit.

F. All Parties desire to settle the Lawsuit on the terms and conditions described in this Agreement.

Therefore, the Parties agree as follows:

TERMS

1. Payment Terms. Within thirty (30) days of mutual execution of this Agreement, the City shall receive one check payable to the City of Auburn from Jacobs Engineering Group, Inc. for Ten Thousand Dollars and 00/100 (\$10,000) and one check payable to the City of Auburn from W&H Pacific, Inc. for Two Hundred Forty-Three Thousand Seven Hundred Sixty-Eight Dollars and 50/100 (\$243,768.50) for a total payment of Two Hundred Fifty-Three Thousand Seven Hundred Sixty-Eight Dollars and 50/100 (\$253,768.50).

2. Waiver and Unconditional Release by the City. The City does hereby forever release, remise, acquit, and discharge Jacobs Engineering Group, Inc. and W&H Pacific, Inc., their affiliates, predecessors, shareholders, subsidiaries, affiliated entities, agents, employees, contractors, subcontractors, officers, directors, representatives, successors, assigns, engineers, attorneys, and all other persons or entities who are claimed to be or may be liable of and from any and all claims, demands, damages, liabilities, suits, actions, and causes of action of whatsoever kind, nature, or description, present and future, now known or hereafter discovered, whether arising in law or equity, upon contract or tort, or under state or federal law or laws, or under common law or otherwise, which the City has had, now has, or hereafter may have or claim to have, against Jacobs or W&H Pacific for or by reason of any act, omission, matter,

cause or thing whatsoever related to the Lawsuit, the Monk Lawsuit, or the Contract.

The City acknowledges that it has specifically contemplated and bargained for the extinguishment of all Claims arising from the Lawsuit, the Monk Lawsuit, or the Contract, as well as unknown claims, and is aware of the holding in Nevue v. Close, 123 Wn.2d 253, 867 P.2d 635 (1994). The City further agrees to defend and hold Jacobs and W&H Pacific harmless from any and all liens and subrogation interests arising out of either the Lawsuit, the Contract, the Monk Lawsuit, or this Settlement Agreement. The City's duty to defend and hold Jacobs and W&H Pacific harmless extends to any subrogation interest that has been or could be asserted by the City's liability carrier with relation to the Lawsuit, the Contract, the Monk Lawsuit, or this Settlement Agreement.

3. Waiver and Unconditional Release by Jacobs. Jacobs hereby releases W&H Pacific, its affiliates, predecessors, shareholders, subsidiaries, affiliated entities, agents, employees, contractors, subcontractors, officers, directors, representatives, successors, assigns, engineers, and attorneys in the same manner and to the extent of the City's release as expressly stated in Paragraph 2.

4. Waiver and Unconditional Release by W&H Pacific. W&H Pacific hereby releases Jacobs, its affiliates, predecessors, shareholders, subsidiaries, affiliated entities, agents, employees, contractors, subcontractors, officers, directors, representatives, successors, assigns, engineers, and attorneys in the same manner and to the extent of Jacobs' release as expressly stated in Paragraph 3.

5. No Admission of Liability. The Parties acknowledge that the releases set forth herein and Jacobs' and W&H Pacific's giving of consideration pursuant to the terms of this

Agreement do not constitute an admission of liability by Jacobs or W&H Pacific and are given in full settlement and compromise of the disputed claims alleged by the Parties in the Lawsuit.

6. Representation. The City of Auburn is represented herein by Daniel B. Heid and Stephen R. King of the City of Auburn Legal Department. Jacobs Engineering Group, Inc. is represented herein by Stanton P. Beck and Jennifer M. Beyerlein of Lane Powell PC. W&H Pacific, Inc. is represented herein by Henry Jameson of Jameson, Babbitt, Stites & Lombard, P.L.L.C. The Parties acknowledge that their respective attorneys have fully advised them concerning their rights with respect to the execution of this Agreement and its effects and that they understand the same; and that the named attorneys are authorized and directed to take all necessary action to dismiss with prejudice all claims and causes of action set forth in the Lawsuit without costs or attorneys' fees to any Party, each Party to bear that Party's own fees and costs.

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9. Jointly Drafted. This Agreement has been drafted jointly by the Parties following negotiations between them. It shall be construed according to its terms and not for or against any Party.

10. Entire Understanding. This Agreement contains the entire understanding of the Parties in connection with the subject matter of this Agreement and it supersedes and replaces all prior negotiations, statements, and representations concerning the subject matter of this

Agreement except as expressly contained in this Agreement.

11. Severability. If any provision of this Agreement is deemed by law to be void, invalid, or inoperative for any reason, or any phrase or clause within such provision is deemed by law to be void, invalid, or inoperative, that phrase, clause, or provision shall be deemed modified to the extent necessary to make it valid and operative, or if it cannot be so modified, then such phrase, clauses, and provisions shall be deemed severed from this Release, with the remaining phrases, clauses, and provisions continuing in full force and effect as if the Agreement had been signed with the void, invalid, or inoperative portion so modified or eliminated.

12. Authority. The Parties acknowledge and represent that they are effecting this settlement and executing this Agreement after having received full legal advice to their rights from legal counsel, and hereby warrant that they have the sole right and exclusive authority to perform their respective obligations under this Agreement and receive the benefits specified herein, and that no other person or entity has or has had any interest in the claims released herein, nor have any of the claims referred to herein been sold, assigned, transferred, conveyed or otherwise disposed of.

13. Descriptive Headings. Titles to paragraphs in this Agreement are for informational purposes only and are not intended to limit or amplify the content of any paragraph.

14. Execution. This Agreement may be executed in any number of counterparts, and each such counterpart hereof shall be deemed to be an original instrument, but all such counterparts shall constitute one agreement.

15. Amendment. This Agreement may not be amended, altered or modified, except by a written amendment executed by all Parties.

DATED this _____ day of _____, 2009.

The City of Auburn

By _____
 _____ *Name*
 _____ *Title*

[illegible]

I, the undersigned, a Notary Public in and for the State of Washington, hereby certify that on this _____ day of _____, 2008, personally appeared before me _____, to me known to be the individual described in and who executed the foregoing instrument and acknowledged that he/she signed the same as his/her free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand the day and year last above-written.

Notary Public
in and for the State of Washington.
Residing at _____
Commission Expires: _____

DATED this _____ day of _____, 2009.

Jacobs Engineering, Inc.

By _____

Name
Title

STATE OF CALIFORNIA)
) ss.
COUNTY OF _____)

I, the undersigned, a Notary Public in and for the State of California, hereby certify that on this _____ day of _____, 2008, personally appeared before me _____, to me known to be the individual described in and who executed the foregoing instrument and acknowledged that he/she signed the same as his/her free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand the day and year last above-written.

Notary Public
in and for the State of Washington.
Residing at _____

DATED this _____ day of _____, 2009.

W&H Pacific, Inc.

By _____
 _____ *Name*
 _____ *Title*

[illegible]

I, the undersigned, a Notary Public in and for the State of Washington, hereby certify that on this _____ day of _____, 2008, personally appeared before me _____, to me known to be the individual described in and who executed the foregoing instrument and acknowledged that he/she signed the same as his/her free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand the day and year last above-written.

Notary Public
in and for the State of Washington.
Residing at _____
Commission Expires: _____